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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. .

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

—against—

LONG ISLAND LIGHTING COMPANY.

BRIEF OF LONG ISLAND LIGHTING COMPANY IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI AND IN OPPOSITION TO APPLICATION FOR TEMPORARY RESTRAINING ORDER.

There is little to add to the opinions of Circuit Judges Simons and Hutcheson, contained in Appendix A hereto, and not yet officially reported.

Because of its exclusively intrastate character Long Island Lighting Company (hereinafter referred to as Long Island) applied for and obtained an order from petitioner exempting it from every provision of the Public Utility Holding Company Act. As occasion arose for the making of necessary changes in its capital structure and after the approval of all classes of its stockholders, Long Island, pursuant to the requirements of the Stock Corporation Law and the Public Service Law of the State of New York, submitted the proposed plan to the Public Service Commission of the State of New York for approval. This was the only tribunal having any jurisdiction whatever in the matter. After the proceeding had been pending several months before the New York Public Service Commission, and after extensive public hearings

on the plan had been concluded, petitioner gave notice of a hearing before petitioner to consider the subject of revocation of the order of exemption.

Contrary to the statement made in petitioner's application there are no "pending administrative proceedings instituted by the Commission, * * * to determine whether a recapitalization plan, challenged as contrary to the fair-and-equitable and public-interest standards of the Holding Company Act, should be subject to those standards". The only administrative proceeding now pending in which Long Island is respondent is the aforesaid proceeding to determine whether the previously granted order of exemption shall be revoked.

Prior to the hearing before petitioner, the New York Public Service Commission issued an order approving the plan. Upon the filing of the order, together with the certificate of recapitalization, with the New York Secretary of State the new plan became at once legally effective. Each step taken by Long Island was strictly in accordance with law and there is no claim that anything done by Long Island or by the New York Public Service Commission constituted any violation of any order, rule or regulation of petitioner or any provision of the Public Utility Holding Company Act or any other statute.

The relief prayed in the pending proceeding in equity is for a temporary and permanent injunction restraining Long Island from performing certain mechanical acts recognizing the consummation of the said plan of recapitalization. These mechanical acts have to do with the distribution of new shares, the over-printing of certain existing certificates and the making of a large number of book entries relative to certain depreciation and other items as directed by the New York Public Service Commission.

No claim is made that petitioner or any other body or tribunal now has jurisdiction to alter the plan now in

effect. As stated by District Judge Kennedy in his opinion:

> "It [Long Island] has sought and secured the approval of the necessary State authorities to the plan and has terminated the rights of the stockholders as they formerly existed. Nothing can revive the old set of rights and liabilities; no one can substitute a new set. Meanwhile it will be impossible for the corporation, or anyone else, to determine how its stockholders shall vote."

At the time the plan thus became effective, and at all times thereafter, petitioner was and is wholly without jurisdiction to pass upon the plan or to take any action whatever in relation thereto. This proceeding was brought by petitioner wholly upon the hypothesis that at some future date petitioner might, after a hearing and consideration of the evidence: revoke the order of exemption; find that Long Island, contrary to all appearances, was in some way engaged in interstate commerce; require that Long Island register under the Public Utility Holding Company Act; and entertain a proceeding under Section 11 of the Act to inquire into the existing capital structure. As stated by Circuit Judge Simons:

> "This it has not done, and may never do."

The so-called interesting public questions referred to in the petition for certiorari, relative to petitioner's application to Long Island's corporate structure of petitioner's "simplification standards" and its "fair and equitable standard", are thus not now presented and may never be presented. As further stated by Judge Simons:

> "The Commission has presently no regulatory or supervisory control over Long Island, no duties with respect to it, save only an inquiry whether an exemption is to be revoked, which the Commission concedes it may not appropriately prejudge."

Any interference by the courts at such a time would inevitably impair the powers and jurisdiction of state instrumentalities which is specifically ruled out by Section 21 of the Act and by USCA Title 28, Sec. 379.

Accordingly, the simple inquiry which the courts below have made herein was whether, under the circumstances above related, petitioner was authorized by law to seek the relief requested and the courts authorized by law to grant it. Petitioner's powers are those and those only which the Congress has chosen to give it and the same is true of the District Courts.

I.

That the Congress never intended petitioner to have any such extraordinary and unnecessary power as the power to invoke the aid of equity in support of a presently non-existent and wholly speculative jurisdiction *in futuro*, and that the Congress never intended to confer upon the District Courts the power to entertain any such applications is demonstrated beyond peradventure of doubt in the short concurring opinion of Circuit Judge Hutcheson.

When, as and if there shall be some violation by Long Island of some order, rule or regulation of petitioner or a violation of some provision of the Public Utility Holding Company Act, it will be found that the Act contains ample and sufficient provisions for resort to the courts by applications for injunctive relief and otherwise.

II.

Petitioner has wholly failed to present any reasonable basis for the jurisdiction which it asserts to exist.

Neither the petition for certiorari herein nor the dissenting opinion of Circuit Judge Clark contain any statement of reasons which could fairly be said to support petitioner's contention.

As pointed out by Circuit Judge Simons, *Securities and Exchange Commission* v. *U. S. Realty and Improvement Co.*, 310 U. S. 434, has no bearing upon the situation now presented. In that case the District Court had undoubted jurisdiction of the proceeding pending before it under one of the chapters of the Bankruptcy Act and the intervention by petitioner was in strict accordance with Rule 24 of the Rules of Civil Procedure, made applicable to bankruptcy proceedings by Par. 37 of the General Orders in Bankruptcy.

The claim that this proceeding is a proceeding "brought by the United States or by any officer thereof authorized by law to sue" is fanciful and requires no comment. It is significant that this contention, which was so strongly urged in the courts below, is conspicuous by its absence from the petition now before this Court.

The substance of the dissenting opinion by Circuit Judge Clark appears to be that he thought it would have been a wiser policy for Long Island to refrain from raising the questions of jurisdiction and power and that he was hopeful that, pending the coming down of the mandate in the Circuit Court, petitioner might assume the responsibility of itself issuing some form of injunctive order, while at the same time the complaining stockholders might bring an equitable proceeding of their own, provided they could establish the necessary diversity of citizenship.

As was the case in the oral argument before Mr. Justice Jackson on the application for a temporary restraining order, many arguments are presented based upon various aspects of the plan of recapitalization and other matters not now relevant, but little or nothing said to support on the merits the claim that the District Court had a jurisdiction which both the United States District Judge and the Circuit Court of Appeals for the Second Circuit have denied.

III.

It is our understanding that petitioner's application for a temporary restraining order will come before this Court together with the application for certiorari.

Despite the complete lack of jurisdiction in the District Court herein, Long Island has been enjoined by a series of temporary restraining orders. Finally, the Circuit Court of Appeals refused to grant a further temporary restraining order during the pendency of petitioner's application for certiorari, but did grant such an order for the brief period of five days pending the making of such an application to one of the Justices of this Court. Thus for over three months, despite the conceded fact that the plan of recapitalization is in full legal effect under New York law, Long Island has remained a corporation wholly without stockholders and in a position which daily becomes more precarious. The imminence of its annual stockholders' meeting and the grave danger of a default under both of its existing bond issues, together with the hazard of some unforeseen and unexpected new development devised by the ingenuity of some of its former stockholders need no elaboration.

Despite the repeated assertions that proceedings before petitioner may prove "nugatory" and that the consummation of the plan may "make moot important objectives of the proceeding before the Commission", the undoubted fact is that the powers of petitioner under Section 11 of the Act, should petitioner revoke the order of exemption, find that Long Island was engaged in interstate commerce, require registration under the Act, and finally obtain and assert jurisdiction to inquire into Long Island's capital structure, will be wholly effective within the limits prescribed by the statute. As stated by Circuit Judge Clark in his dissenting opinion:

"Whatever this court does, indeed whatever may be

the end of this present proceeding, the law will remain and the duty of the S. E. C. to hear and decide —if necessary, in a new proceeding and under another section of the statute—will still exist."

Apparently what petitioner complains of is the circumstance that, in some future proceeding under Section 11 of the Act, petitioner will have to consider Long Island's capital structure not as it existed prior to the order of the New York Public Service Commission, but its capital structure as altered by the action taken by the New York Commission. But this is something which cannot be avoided, in any event. The new capital structure, as has already been stated, is now in full force and effect and cannot now be altered.

CONCLUSION.

The application for a temporary restraining order and the application for writ of certiorari should both be denied.

Dated: New York, N. Y., March 22nd, 1945.

Respectfully submitted,

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APPENDICES.

APPENDIX A.

(Opinions of C. C. A.)

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 233—October Term, 1944.

(Argued January 15, 1945 Decided February 23, 1945.)

SECURITIES AND EXCHANGE COMMISSION,

Appellant,

—*v.*—

LONG ISLAND LIGHTING COMPANY,

Appellee.

Before:

HUTCHESON, SIMONS and CLARK,

Circuit Judges.

Appeal by the Securities and Exchange Commission from an order of the District Court for the Eastern District of New York denying appellant's motion for an injunction enjoining appellee from carrying out a plan of recapitalization approved by the Public Service Commission of New York. Order Affirmed.

HAROLD R. MEDINA, CHARLES G. BLAKESLEE, CHARLES E. ELBERT, JOHN J. DONOHUE, RICHARD T. DAVIS, of counsel for appellee.

ROGER S. FOSTER, Solicitor; MORTON E. YOHALEM, Counsel, Public Utilities Division; DAVID K. KADANE, Special Counsel, Public Utilities Division; THEODORE L. THAU, Special Counsel; HARRY G. SLATER, SOLOMON FREEDMAN, for the Securities and Exchange Commission.

On brief as *Amici Curiae*:
MILTON POLLACK for preferred stockholders.
WILLIAM A. LOCKWOOD for New York Curb Exchange.

SIMONS, *Circuit Judge:*

The appellant sought temporary and permanent injunctions restraining the appellee from consummating a plan for its recapitalization until determination of proceedings pending before the Commission, involving the status of the appellee under the Public Utility Holding Act of 1935, 49 Stat. 803, 15 U. S. C. A. §78 (a) *et seq.* The District Court denied the preliminary injunction on the ground that it lacked power to grant the relief sought. A temporary restraining order pending hearing, having been dissolved, a judge of this court granted a temporary restraining order pending hearing on the appeal.

The Commission sought protection by the District Court in the carrying out of duties asserted to devolve upon it under the Public Utility Holding Act, by enjoining the appellee from taking further steps to effectuate a plan of recapitalization, until in an administrative proceeding before it, it was determined whether rights sought to be affected by the plan should be subjected to the reorganization standards of §11 of the Act. The specific action sought to be enjoined is the overprinting of existing cer-

tificates for preferred stock and the issuance of new common stock, and the nature of the relief sought is the preservation of the *status quo*.

The appellee is a holding company as defined in §2(a)(7) of the Act, but exempt from the registration and regulatory provisions of the Act by an order of the Commission dated March 27, 1936. That order is, by its express terms, subject to revocation after hearing and a finding by the Commission that the circumstances which gave rise to its issuance no longer exist. The exemption is authorized by §3(a) of the Act and may be revoked in pursuance of §3(c).

On November 4, 1944, a petition was filed with the Commission by the preferred stockholders of the appellee, which led to the institution of proceedings by the Commission on November 10, to determine whether the exemption should be in whole or in part revoked. The stockholders represented that the appellee was endeavoring to effectuate a recapitalization plan unfair to them and had engaged in activities which burdened interstate commerce and the means and instrumentalities of interstate commerce. On November 21, 1944, the Commission instituted a separate proceeding under §2(a)(7)(B) of the Act, for the purpose of determining whether certain persons or corporations owning or controlling substantial amounts of outstanding common stock of the appellee, exercised such a controlling influence over its management or policies as to make it necessary, in the public interest and for the protection of investors or consumers, that the appellee be subjected to the obligations, duties, and liabilities imposed by the Act. On November 22 the two proceedings were consolidated and a hearing ordered for December 19, which, for reasons presently appearing, was not held. It is asserted that if it should be determined that the exemption granted to the appellee be revoked or modified, the consequence would be that the promulgation and consummation of the plan of recapitalization would then be

subject to the jurisdiction, scrutiny, and approval of the Commission under the applicable standards of the Act.

On December 18, prior to the date set for hearing, it came to the Commission's attention, through the press, that the appellee was undertaking to consummate a plan under New York law without awaiting a determination whether it would be permitted to continue to enjoy its exemption, or whether it would be required to register as a holding company, or be subjected to the supervision of the Commission, and the present proceeding was at once begun to restrain such consummation.

Prior to its inauguration, the stockholders of the appellee had voted in favor of a plan of recapitalization proposed by its management, and on February 29, 1944, pursuant to requirements of the Stock Corporation Law and the Public Service Law of the State of New York, it was submitted to the Public Service Commission of New York. After extensive public hearings from March through September, the recapitalization plan was approved by the State Commission on December 14, 1944. By law, that Commission is required to withhold approval unless it finds that the plan is in the interest of investors. *Rochester Gas & Electric Corp.* v. *Maltbie*, 284 N. Y. 626. The appellee promptly filed its certificate of recapitalization together with the order of approval, in the office of the Secretary of the State of New York, in pursuance of the Stock Corporation Law. The plan became effective upon such filing (General Corporation Law, §8), the rights of the stockholders under the corporate structure thereupon came to an end, trading in the old stock ceased on the New York Curb Exchange on December 16, and trading in the new stock commenced on December 18. On December 19 the appellee was ordered to show cause why a preliminary and permanent injunction should not be entered restraining it from carrying out the recapitalization plan, and concurrently the temporary restraining order issued. Because of it and the order out of this

court compelling further restraint pending hearing on appeal, the appellee says it is now a corporation without stockholders and unable to do any of the things which, by state law, require the approval of stockholders.

The court, without determining whether a case had been made out for equitable relief by a showing of irreparable harm if the injunction should be withheld, and without considering whether state law provided a remedy to the preferred stockholders which they failed to invoke, denied the relief sought solely upon the ground that the Commission was without power, conferred upon it by the Act, to seek, and the court without power, because of limitations upon its jurisdiction, to grant it.

The Commission bases its appeal mainly, if not solely, upon the asserted legal principle that a federal court has power, upon the application of an administrative agency before which an administrative proceeding is pending, to preserve the *status quo* until such proceeding is concluded. The necessity for the preservation of such status is sought to be demonstrated by argument that if further steps are taken by the appellee to consummate its recapitalization plan, the rights of preferred stockholders will be broken up into new preferred and common shares in distributable form, and it might become impossible to adjust their rights on a basis which would adequately reflect existing equities. Trading in the new common stock would cause intervening equities in the purchasers to arise, and there would be serious doubt that the new stock could once more be separated so as to permit fair treatment to all security holders. In any event, trading in Long Island securities would be upon a misleading basis and there would be substantial difficulties in achieving the fair and equitable result contemplated by the Act.

The Commission asserts, however, that it does not rely for its authority to seek relief, upon any specific grant of the statute. It disclaims reliance upon §18(f) as a basis for the jurisdiction of the court, for that section grants it

authority to bring an action in a proper district court of the United States only for acts or practices which constitute or will constitute a violation of the provisions of the Act, or of any rule, regulation, or order thereunder, and it concedes there have been no such violations. It plants itself squarely upon the general equity powers of District Court under §24 of the Judicial Code which extend, *inter alia*, to all suits of a civil nature at common law or in equity, brought by the United States or by any officer thereof authorized by law to sue. In support of its position it argues that the various branches of the federal government have certain implied and inherent powers which will be exercised, where appropriate, to protect the proper functioning of another branch of the government, that preservation of the *status quo* pending determination, is a traditional aspect of equity jurisdiction, and that the circumstances of the present case amply warrant its exercise to prevent circumvention of the Commission's jurisdiction under the Holding Company Act. It deems it an unnecessary refinement to determine whether particular cases relied on rest upon the fact that the action is brought by the United States or by an officer thereof authorized to sue, or upon the existence of a federal question, or upon the ground that the case falls within §24(8) of the Judicial Code applicable to "all suits and proceedings arising under any law regulating commerce". In seeking injunctive relief the Commission asserts it is asking the court to exercise the same kind of jurisdiction which a federal court would employ to protect its own jurisdiction, and to preserve a *status quo* pending proceedings before another tribunal.

The cases relied upon, however, which sustain the right of a federal equity court to preserve a *status quo* pending proceedings before it or another tribunal, are mainly those in which restraint is sought to protect a jurisdiction otherwise acquired. Such are the bankruptcy cases, typified by *Continental Ill. N. B. & T. Co.* v. *Chi. R. I. Co.*,

294 U. S. 648, and equity receivership cases, such as *Graselli Chemical Co.* v. *Aetna Explosives Co.*, 252 Fed. (2d) 456 (C. C. A. 2). No case has been cited to us, and none has been found, where a federal court has undertaken to protect by injunction a jurisdiction not presently existing, merely because upon speculative and problematical circumstances, such jurisdiction may at some uncertain time in the future, arise.

The Commission leans heavily upon *Securities & Exchange Commission* v. *U. S. Realty and Improvement Co.*, 310 U. S. 434, as a compelling precedent. There the respondent brought reorganization proceedings under Chapter XI of the Bankruptcy Act. Chapter X also provides for reorganization, but permits participation by the Securities & Exchange Commission in proceedings in the District Court. The Commission was allowed to intervene in the Chapter XI proceeding on the ground that it is charged with the performance of important public duties under Chapter X, which will be thwarted if a debtor may secure adjustment of his debts under Chapter XI. The Court found that the Commission's duty and its interest extends not only to the performance of its prescribed functions where a petition is filed under Chapter X, but to the prevention, so far as the rules of procedure permit, of interference with their performance through improper resort to Chapter XI proceedings in violation of the public policy of the Act which it is the duty of the court to safeguard. Such permissive rule of procedure was found to be Rule 24 of the Rules of Civil Procedure, made applicable to bankruptcy proceedings by para. 37 of the General Orders in Bankruptcy. By it a party may be permitted to intervene in an action when its claim or defense and the main action have a question of law or fact in common. This provision dispenses with any requirement that the intervenor shall have a direct, personal, or pecuniary interest in the subject of the litigation.

The right to intervene, however, does not imply a right to bring an original suit, *Sprunt & Sons* v. *U. S.*, 281 U. S. 249, 255; *P. & W. Va. Ry. Co.* v. *U. S.*, 281 U. S. 479. In the *U. S. Realty Company* case jurisdiction of the court was originally invoked in the exercise by it of the bankruptcy power conferred upon a court of bankruptcy by §§74, 75, and 77 of the Act of March 3, 1933, to which Chapters X and XI have succeeded. Under those sections, if the petition be approved, the court, during the pendency of the proceedings, is given exclusive jurisdiction of the debtor and its property wherever located, and it is not necessary to its validity that the proceedings should result in an adjudication of bankruptcy. *Continental Ill. N. B. & T. Co.* v. *Chi. R. I. Co., supra.* It is, of course, established doctrine that a federal court, having first acquired jurisdiction of the subject matter, may enjoin parties from proceeding in other courts where the effect of the action would be to defeat or impair the jurisdiction of the federal court, *Kline* v. *Burke Constr. Co.*, 260 U. S. 226, 229, but we fail to perceive its aid to the Commission, even though it extends to the protection of proceedings before an administrative tribunal.

The subject matter involved in the Commission's proceeding, was a determination whether to take jurisdiction over Long Island. It had previously exempted it. To say that it was seeking to protect a jurisdiction, which once it had renounced and was now undertaking to regain, is a contradiction in terms. The Commission has presently no regulatory or supervisory control over Long Island, no duties with respect to it, save only an inquiry whether an exemption is to be revoked, which the Commission concedes it may not appropriately prejudge. It has no jurisdiction over Long Island to be protected, and may draw such jurisdiction to itself only by a finding, after hearing, that circumstances which gave rise to the exemption, no longer exist, and by the

promulgation of an order of revocation. This it has not done, and may never do.

Pennsylvania v. *Williams*, 294 U. S. 176, is urged upon us as authority for holding that a governmental agency may have judicial aid by a stay of judicial proceedings which would interfere with its administrative functions. There the state intervened in a receivership proceeding in a federal court, praying that federal receivers be required to surrender the assets of a corporation to a state agency for liquidation under state law. The court required the District Court to discharge its receivers and direct them to surrender the property to the state commission which had commenced proceedings for the winding up of the association, under state law. This is again an intervention ancillary to validly acquired jurisdiction over the property of the association. We do not perceive it to be authority for a holding that in this case the court should have interfered with the action of the New York Commission at a time when the appellant was without jurisdiction over Long Island. Moreover, the *Williams* case points out that it has long been accepted practice for the federal courts to relinquish their jurisdiction in favor of state courts where its exercise would involve control of or interference with the internal affairs of a domestic corporation, and that there are stronger reasons for adopting a like practice where the exercise of jurisdiction involves an unnecessary interference by injunction with the lawful action of state officers, citing *Matthews* v. *Rogers*, 284 U. S. 521, 525. This is but another aspect of the doctrine that federal courts will carefully observe constitutional limitations upon their jurisdiction, and avoid unnecessary interference with state action. The principle is illuminated for present purposes by *Board of Railroad Commrs.* v. *Great Northern Ry. Co.*, 281 U. S. 412, where it was held that under the Interstate Commerce Commission Act the courts have no authority to prevent a carrier, by injunction, from putting into effect allegedly unfair intrastate rates until the Commission

has a chance to determine their validity. "A judicial restraint of the enforcement of intrastate state rates, although limited to the pendency of proceedings before the Interstate Commerce Commission, is none the less essentially a restraint upon the power of the State to establish rates for its internal commerce, a power the exercise of which in prescribing rates otherwise valid is not subject to interference upon the sole ground of injury to interstate commerce, save as Congress has validly provided. Congress has so provided only in the event that, after full hearing in which the State authorities may participate, the Interstate Commerce Commission finds that unjust discrimination is created". It was also said that "the questions whether there is injury, and what the measures shall be to prevent it, is committed for its solution preliminarily to the Interstate Commerce Commission". It would seem, therefore, that the court in the present case may not interfere with the domestic affairs of a state corporation seeking reorganization or recapitalization under state law, until by formal action of the Commission it was brought within the jurisdiction of the Act which alone created the Commission, and from which it alone derives authority.

While the Commission does not base its suit for relief upon any express authority conferred upon it by the Act, but rests its case upon the general equity powers of a federal court, it is not without importance that, by the terms of the Act which purport to provide for a comprehensive scheme for control of practices by public utility holding companies and affiliates affected with a national public interest, the Congress conferred upon the Commission in §18(a) and §11(d), the power to invoke the aid of the courts only to prevent evasions of the Act and noncompliance with the orders of the Commission. There is concededly no power to restrain or discipline holding companies exempt from its provisions. It would seem, therefore, that the guide to statutory construction in the maxim *expressio unius exclusio alterius,* is applicable. Express

powers are generally construed to be in negation of powers not expressly granted, and the application of the maxim here is not such an unwarranted use thereof as it was found to be in the *Continental Ill. N. B. & T. Co.* v. *Chi. R. I. Co., supra,* where it required other provisions of law to be ignored.

The appellee was exempted from the provisions of the Public Utility Holding Company Act; it has violated no law; it has disobeyed no order or regulation of the Commission. Finding itself in a critical situation in respect to the maturity of its securities, and in need of some change in its corporate structure, it applied for relief to the only agency authorized to grant it, namely, the Public Service Commission of the State of New York, with the sanction of its stockholders. There is no contention that it acted unlawfully; there is no requirement of law that obliged it to advise the appellant of the proceedings before the New York Commission, or of that body's favorable action upon its application. That its endeavor was precipitous may or may not have been in pursuance of its need—of that we are not advised. The Commission says that it did not overlook the possibility of its issuing a summary order under the residual powers conferred upon it by §20(a) of the Act, giving it authority from time to time to issue, amend, and rescind its rules and regulations, but that it seemed to it more consonant with traditional doctrines to rely upon the courts rather than upon an administrative agency itself for interlocutory relief, and advises us again and again that it has been careful not to prejudge the merits of the plan. It asserts, nevertheless, that the basis for its application for equitable relief was the conviction that a very serious question is presented as to whether the plan conforms to standards of the Act designed to protect the public interest, and alleges that there is serious doubt whether, if presented to the Commission, the plan would be found to meet the standards prescribed by Congress for the protection of the investors. But no question in the collective

mind of the Commission can give rise to a justiciable controversy, nor may its pronouncements, policy, or program, save as they have fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of others, for the judicial power does not extend to the determination of abstract questions. *Ashwander* v. *Valley Authority*, 297 U. S. 288, 324.

The Commission argues that because of the extraordinary complexity of the programs dealt with, and the fact that the holding company device has become so largely a mechanism for circumventing legal restraints, it is especially important that the Act be given a broad and flexible construction; that in view of the public purpose to be served, it would seriously impair or limit its accomplishment if the presently sought remedy were withheld, and that there must be an inter-play of functions on the part of both agencies and courts, in preventing the Act from being circumvented or evaded by methods which could not be foreseen and specially provided for. Undoubtedly these broad aspects of the matter must weigh heavily with courts of equity, but while courts have upon occasion bridged gaps in the law by construction when compelled by clearly expressed legislative purpose, yet "judicial law-making should always be cautiously employed and should be severely restricted in scope". *New England Coal & Coke Co.* v. *Rutland R. Co.*, 143 Fed. (2d) 179, 189 (C. C. A. 2).

If it be said that a proceeding for reorganization or recapitalization under state law by an exempt corporation may, for all practical purposes, nullify the power of the Commission to exercise its rights and fulfill its duty to revoke the exemption, it may also be said that an overriding authority to revoke at any time leaves an exempt corporation completely helpless, if in times of financial stress it becomes necessary to reform its capital structure. It may not submit its plan of reorganization to the

Commission because it is not subject to the authority of the Commission, and its exemption may have value to it or to new investors which neither its directors nor stockholders may be willing to surrender. It may not, except at its peril, resort to the remedial provisions of state law, for if it does the Commission, upon the petition of any disgruntled stockholder or group of stockholders, may, by a proceeding such as this, invoke the strong arm of a court of equity between plan and its consummation without regard to the exigency nor to the effort and expense that may have been expended in formulation. We cannot but conclude that the Congress, either deliberately or by indirection, left unoccupied an area of supervision and control by the Commission. It is neither a novel nor unexpected result. In the difficult task of framing legislation to reach newly sensed evils in a complicated social, economic, and financial organization, the finite intelligence of the Congress may not always foresee all of the situations that may arise which call for supervision and regulation. The classical illustration derives from our endless succession of tax laws, and the distinction which the courts have drawn between tax evasion and tax avoidance. For the former the law provides its own discipline —for the latter, resort must again be had to the Congress.

The Commission, by supplemental brief, requests that in the event of affirmance of the order below, it may have a reasonable opportunity to examine our decision in order to determine whether it should apply for a rehearing or seek further review, and so requests such further stay as may be necessary in that connection. We consider the problem here resolved not free from doubt, and that it is within our power to stay proceedings notwithstanding anything that may have been said in *Virginia Ry.* v. *U. S.*, 272 U. S. 658, 672, *et seq.* The presently operative restraining order will be continued until mandate shall have issued.

The order below is affirmed.

HUTCHESON, *Circuit Judge*, Concurring Specially:

I concur in all that is said in Judge Simons' excellent opinion. I think, though, that the short and simple answer to appellant's claim of jurisdiction is to be found in the fact that Section 25[1] of the Public Utility Holding Company Act, which defines the jurisdiction of the federal courts with respect to suits brought by the commission does not grant jurisdiction of a suit of this kind. I write this brief concurrence to say so. I think it may not be doubted that this section and Sections 11(d)(e)(f) and 18(d)(f), which state the circumstances and the manner in which the commission can apply to the courts for relief, were intended to be, and are, as to jurisdiction, both inclusive and exclusive. A word by word examination of

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[1] Section 25 provides:

"The District Courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this title or the rules, regulations, or orders thereunder, and concurrently with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this title or the rules, regulations, or orders thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this title or rules, regulations, or orders thereunder, may be brought in any such district or in the district wherein the defendant is an inhabitant or transacts business, and process in such cases may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U. S. C. title 28, secs. 225 and 347), and section 7, as amended, of the Act entitled 'An Act to establish a court of appeals for the District of Columbia', approved February 9, 1893 (D. C. Code, Title 18, Sec. 26). No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against the Commission in any court."

these sections makes it clear that nothing in them authorizes the suit here brought. Indeed, the commission in its brief disclaims them as the jurisdictional basis of the suit. In my view, this disclaimer, in the light of the settled rule of law that a statutory scheme intended to be all inclusive must be treated as exclusive also, settles the controversy against the commission. For it is of the essence of such a scheme that what is not included is excluded.[2] The commission, therefore, in asserting a roving commission to sue for, or as, the United States, *In Re: Debs*, 158 U. S. 564, finds itself confronted with the difficulty, inherent in efforts to induce a court of special jurisdiction to embark upon the exercise of jurisdiction, vague in its generality, and general in its vagueness. But this is not all. It finds itself confronted with the one of attempting to sue out of the character with which the law has invested it, of invoking a jurisdiction beyond that to which the statute, by especially defining, has limited it. It seems quite clear to me that unless we are now to abandon in favor of notions completely alien to our system of law, the settled doctrines of federal jurisdiction and of statutory construction prevailing here, we must say: that the commission is the creature of statute; that it lives and moves and has its being by statutory authority alone, and only within statutory confines: that the creature may not say to its creator, "Why hast thou created me thus?"; and that the commission may not, therefore, by any kind of mysterious metempsychosis, become disembodied from, and disenthralled of, the statute which gives it life, to sue not as creature but as creator, in short, as the United States itself. Because then the statute of its creation does not grant, but in effect denies, the jurisdiction invoked, I am in no doubt that the district judge was right and that his judgment should be affirmed.

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[2] *Posey* v. *TVA*, 93 F. (2) 726; *TVA* v. *Kinzer*, 142 F. (2) 833; *Breeding* v. *TVA*, 9 So. (2) 6.

CLARK, *Circuit Judge* (dissenting):

Public Utility Holding Company Act of 1935, §3(a), 15 U. S. C. A. §79c(a), authorizes the Securities and Exchange Commission to exempt certain holding companies of a predominantly intrastate character from the provisions of the Act, "unless and except insofar as it finds the exemption detrimental to the public interest or the interest of investors or consumers"; but under §3(c), it "shall" revoke the exemption whenever, on its own motion or upon application of a company involved, it "finds that the circumstances which gave rise to the issuance of such order no longer exist." This power and duty of revocation was stressed by the S. E. C. in granting exemption to this defendant in 1936.[1] Just as the S. E. C. was about to proceed to a scheduled hearing of petitions for revocation of the exemption, defendant, assuming to proceed under authority of a hesitant decision of the State Public Service Commission, took precipitous action to put into effect a plan of recapitalization which would change the status of the preferred stockholders—the very matter at issue in the proceedings pending before the S. E. C. That this action, if not restrained, would indubitably scramble the interests of the stockholders,

[1] Thus, after citing the statutory provision, §3(c) *supra*, it appropriately said: "The provisions of Section 1(c) and 3(d) are also sufficient to authorize the Commission to modify or amend its order if it shall find that the exemption is detrimental to the public interest, or that of investors or consumers, by reason of any activities of the applicant or of any such subsidiary company in interstate commerce, or directly affecting or burdening interstate commerce. Of course, no such revocation or modification of the order can be made without first giving the parties in interest due notice and opportunity for hearing." 1 S. E. C. 345, 346, 1936. Inequitable distribution of voting power was held by the Commission to be a ground for refusing exemption under this section in *In re Niagara Hudson Power Corporation.* Holding Co. Act of 1935, Release No. 5115, June 20, 1944; *cf. Ecker* v. *Western Pac. R. R. Corp.*, 318 U. S. 448, 474; *Okin* v. *S. E. C.*, 2 Cir., 145 F. 2d 913. In the present case the Commission was also acting under §2(a)(7)(B), petitions under the two sections being consolidated for a single hearing.

perhaps beyond recall, is obvious; that it is the duty of the S. E. C., upon a finding that the conditions rather strongly indicated *prima facie* do exist, to attempt to unscramble them notwithstanding any obstacles placed in its way seems equally obvious. This duty is certainly not made less insistent by the Supreme Court's solicitude for the observance of security priorities under this Act, shown once again in *Otis & Co.* v. *S. E. C.*, S. Ct., Jan. 29, 1945. Nor, indeed, is it lessened by the constitutional overtones apparent in that decision and already introduced into this case by the contention of the preferred stockholders before the State Commission, which that Commission did not attempt to resolve.

Hence the need of the preventive protection of equity is great; such scrambling and unscrambling of securities can do hardly any one any real good and may do innocent investors, lacking inside knowledge, quite grievous harm. In fact, the only ones who may gain from the company's actions, outside of those frankly speculating or betting on the outcome, are seemingly the management and the common stockholders, who alone can vote and for whom the management is acting. But these, too, can profit only to the extent that presenting a *fait accompli* to the S. E. C. may discourage that body from further activity. Its past record of assiduity in protecting the public interest suggests that even the hope of such a consequence may be in vain.

My brothers' opinion tends to give the picture of an orderly proceeding under state supervision rudely interrupted by the attempted interference of a federal agency to vindicate in an academic way a power which it has not invoked and may never wish to utilize. Since the issue below was strictly limited to one of power and jurisdiction alone and the S. E. C. with great circumspection has attempted to avoid prejudging the issues which may later come before it, the weight of the case against the defendant is perhaps unimportant at this stage of the proceed-

ings. But denial of relief has been rested to a considerable extent upon what is concluded to be the vagrant nature of the federal interest herein. Hence I deem it necessary to emphasize how differently this matter appeared to the State Commission itself than as here stated. That Commission's criticism of the defendant for voting huge dividends to the common stockholders in the past and for denying representation to the preferred stockholders, notwithstanding that their dividends were greatly in arrears, its regret at its own lack of power to rectify the situation, and its final vote of only three in favor of what appears hardly more than a washing of its hands of the matter, over the protest of its able chairman and another commissioner deploring action while matters were "in a crucial stage before the Securities and Exchange Commission," amount to an excoriation of the officers and management which I should have thought they would have wished to show undeserved at the earliest opportunity possible. And certainly no better forum could have been offered them than that of the scheduled hearing before the S. E. C. The support which defendant appears to draw from the State Commission's action seems somewhat odd; for that action is almost a direct invitation or appeal to the S. E. C. to afford the relief the State agency cannot.[2]

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[2] On July 27, 1944, the Commission through Chairman Maltbie rendered an opinion with these significant passages (quoted in the complaint herein):

> "It is quite apparent that the common stockholders do not intend that the management and control of the company shall pass out of their hands, regardless of the equities of the situation. But if they sincerely believe that the plan will actually deprive the interests which have controlled the company of their control in the future, what objection do they have to giving all stockholders voting rights in proportion of their claims against the company?
>
> "The power of the Commission to remedy this condition directly is nil. The Security and Exchange Commission has

[Footnote continued on following page.]

Again the opinion stresses the difficulty under which an exempted company must operate if it must fear the renewed control of the S. E. C. at any time. I cannot avoid the feeling that practically this is an exaggeration of conditions; in daily life milk producers still seem to operate, notwithstanding numerous city health requirements, we all survive various traffic, police, and other regulations, and light and power companies and their holding parents and grandparents are yet operating, in spite of the ministrations of the S. E. C. But the point is that these provisions are announced by the Congress as a part of a general plan of what it considers wise pub-

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[Footnote continued from preceding page.]

dealt rather summarily with such conditions in companies under their jurisdiction, but we have no power to compel a company to readjust its stocks or voting rights in accord with what is considered sound finance and equitable considerations. We can only approve or disapprove, pointing out the facts and the regards in which any proposal fails to deal justly and wisely with the interests affected. Counsel for the company argues that they have 'made a sacrifice' because they could have sold their stock prior to the stockholders' meeting of April 25, 1944 for at least eleven sixteenths dollar per share and received $8.25 for 12 shares (brief p. 11), whereas under the proposed plan each holder of 12 shares is to receive only $5.00 stated value in new common stock. The extent to which the common stockholders could properly claim the offer is magnanimous and is a sacrificial offering may be open to debate. Having received in recent years four times the stated value of their common stock which would have been more than sufficient to pay all arrearages on the preferred stock, it hardly behooves them to assert their great virtue. If they had had as much consideration, for the preferred stockholders as they purport to have now, the company could have avoided the nonpayment of preferred dividends for six years."

Another opinion, dated October 17, 1944, and adopted December 14, 1944, with Chairman Maltbie and Commissioner Burritt not voting for the reasons stated in the text, went into the "Inadequate Participation by Preferred Stockholders," the limited steps taken to meet the problem, and the question raised whether it would be better to abandon the plan altogether or accept what

[Footnote continued on following page.]

lic policy; and we cannot eliminate them, even if we would like to do so. Whatever this court does, indeed whatever may be the end of this present proceeding, the law will remain and the duty of the S. E. C. to hear and decide—if necessary, in a new proceeding and under another section of the statute—will still exist. There are questions here involved too important not to survive a mere ruling of the court's lack of jurisdiction to interfere at a primary stage of the dispute. In fact, one wonders whether defendant is well advised in seeking to shut off an early adjudication of these important issues, in view of what would seem the well-nigh inevitable consequence of rendering its new securities largely unmarketable during the period of uncertainty.[3]

[Footnote continued from preceding page.]

was proposed. In deciding upon the latter it said that the proposed plan was a step in the right direction from the standpoint of the consumer and that it did place the company's financial structure upon a more stable basis. Continuing it said: "However, from the standpoint of preferred stockholders, the plan leaves much to be desired. But the Legislature has not given this Commission the power to formulate a new plan or to engraft changes upon the proposed plan and to compel the company to accept the changes. All that we are authorized to do is to approve or to reject the plan proposed by the company. The Legislature has provided a remedy for any stockholder who is dissatisfied with the plan. He may seek an appraisal of his stock and obtain the appraised value thereof upon compliance with the conditions specified in §§21 and 38 of the Stock Corporation Law." Obviously this latter remedy is not appropriate to restore or protect the value which the plan has already threatened to destroy.

[3] In the light of this situation, resulting from the provisions of the federal state itself, the memorandum of the New York Curb Exchange as *amicus curiae*, suggesting, and apparently objecting, that "the stockholders are in effect frozen and this condition will continue so long as the injunction is in effect," seems surprising. The Exchange ought hardly to take sides in a dispute between classes of investors. But in any event, the Exchange would seem to have some obligation to warn traders of the defects attaching to the new stock even if and when it becomes unfrozen.

In view, therefore, of the undoubted need of a remedy, I think we should direct our attention to possible ways and means to that end, rather than confine ourselves to discovering objections to the method which the S. E. C. has determined upon. After all, we are agreed upon the need of a temporary stay; the District Court is not very far distant from the offices of the S. E. C. in Philadelphia; and a group of preferred stockholders is already before us as *amicus curiae* and obviously ready for greater participation if justified in law. I do not think it would be difficult for my brothers—upon finding doubts I do not share as to the procedure actually followed—to find and state a procedure which will accomplish whatever is necessary. And I conceive it a court's duty to do so, particularly in view of the patent admonition of Congress to that effect, in the first section of the Act, where is set forth at length the evils which gave rise to this legislation[4] and the broad public policy intended to be subserved by it. The legislators wisely knew that they could not foresee all the holes which astute counsel might discover in legislation so far-reaching; and so with foresight they stated a broad policy to guide courts in their approach to statutory interpretation. Certainly they could hardly have forseen a lacuna destructive of the very purposes of specific sections of the Act and resting merely upon the

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[4] One of these was the squeezing out of preferred investors. See Sen. Rep. No. 621, 74th Cong., 1st Sess., 1935, 26, 58; H. R. Rep. No. 1318, 74th Cong., 1st Sess., 1935, 12; S. E. C. Report on Protective and Reorganization Committees, Part VII, 109-187; Dodd, *The Relative Rights of Preferred and Common Shareholders in Recapitalization Plans Under the Holding Company Act*, 57 Harv. L. Rev. 295; Dodd, *Fair and Equitable Recapitalizations*, 55 Harv. L. Rev. 780, 796-806, 816; Latty, *Fairness—The Focal Point in Preferred Stock Arrearage Elimination*, 29 Va. L. Rev. 1, 27-39; *Otis & Co.* v. *S. E. C.*, S. Ct., Jan. 29, 1945, *supra*.

celerity with which a company acts when faced with a call for a hearing before the S. E. C.[5]

Moreover, this very approach was followed in *Securities and Exchange Commission* v. *U. S. Realty & Improvement Co.*, 310 U. S. 434, which reversed this court's conclusion, *In re U. S. Realty & Improvement Co.*, 2 Cir., 108 F. 2d 794, that nothing could be done about a more serious gap in the Chandler Act dealing with corporate reorganizations. Now, after the event, we seem inclined to discover grounds showing that result predestined and easily distinguishable from our present case. Actually, however, the problem of interpretation there was initially much more difficult than the one here. For there, unlike our case, the fundamental jurisdiction of the S. E. C. to act at all was most doubtful, and there appeared to be also positive prohibitions against the S. E. C.'s right even to raise the question. The Chandler Act, in providing for corporate reorganizations under Chapter X and for arrangements under Chapter XI, had set forth overlapping and in part conflicting provisions without any definite suggestion for their reconciliation. Accordingly the Realty Company sought the protection of Chapter XI (wherein the S. E. C. had no rights or duties of any kind), and nothing in express terms negatived its right so to proceed. This initial question of bankruptcy jurisdiction under the statute was the one which proved most difficult throughout the proceedings; out of a total of twelve judges who heard the case at different stages, six were of the view that the company's right to petition only for an arrangement could not be denied. The eventual denial of that right had

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[5] Defendant stresses the need of speedy action under the order of the State Commission and points to the provision in the order that it shall report its acceptance within 30 days after service of the order. But that certainly did not require action the next day and three days before the date of the S. E. C. hearing. Moreover, even if the acceptance required was other than formal, and called for immediate execution of the plan, the Commission, which had been delaying action to secure better results, would obviously have granted more time upon request for cause shown.

to rest, therefore, upon an interpretation of the purposes of the Chandler Act and an exposition of how these would be frustrated by the contrary holding. As to the S. E. C., its only standing, by the terms of the statute itself, was to report upon a plan in a Chapter X proceeding, under certain conditions and with a right of intervention in such a proceeding, but with an express prohibition against appeal, §208, 11 U. S. C. A. §608, which suggested a lack of status beyond the limited one expressed. The District Court, however, had allowed the S. E. C. to intervene to protect the public interest involved; and while this part of the court's judgment was reversed by this court, 108 F. 2d 794, 797-799, it was approved by the Supreme Court as a discretionary ruling under F. R. C. P. 24(b), thus establishing the standing of the S. E. C. to litigate in support of its public responsibilities.[6]

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[6] The opinion suggests that recognition of the S. E. C.'s right to intervene under F. R. C. P. 24 does not support its right to sue directly. It is believed that nothing in Rule 24 supports such a distinction. True, intervention will not require new grounds of federal jurisdiction—an issue which must be faced on an original suit; and injury justifying intervention may more clearly appear when litigation is already under way than where suit is being instituted against *threatened* harm. This is brought out by one of the cases cited in the opinion, *Pittsburgh & W. Va. Ry.* v. *United States*, 281 U. S. 479, 486, as follows: "The mere fact that appellant was permitted to intervene before the Commission does not entitle it to institute an independent suit to set aside the Commission's order *in the absence of resulting actual or threatened legal injury to it.*" (Italics added.) So the reference in the *U. S. Realty* case to the fact that no personal or pecuniary interest was required for the S. E. C.'s intervention, citing *Commonwealth of Pennsylvania* v. *Williams*, 294 U. S. 176, 96 A. L. R. 1166, where the Commonwealth was heard under similar conditions, is support for the general authority of the S. E. C. to act in vindication of a public interest, rather than expansion of a procedural rule beyond anything contemplated in its history. See *Commercial Cable Staffs' Ass'n* v. *Lehman*, 2 Cir., 107 F. 2d 917; 49 Yale L. J. 927, 934; Commentary, *Nature of Permissive Intervention under Rule 24b*, 3 Fed. Rules Serv. 704; Berger, *Intervention by Public Agencies in Private Litigation in the Federal Courts*, 50 Yale L. J. 65.

In our present case the jurisdiction of the S. E. C. to act eventually on the issues presented to it for hearing is beyond dispute under the statute itself; and its duty to appear as a litigant to enforce its orders—eventually—is likewise clear under §18(f), and *cf.* §§11(d)-(f), 25. The real issue, as developed in the opinion herewith, is whether or not this action is premature. (Of course, as a practical matter, action must be taken now to be really effective.) This is demonstrated by the emphasis in the opinion upon an existing jurisdiction of the court as ground for distinguishing cases such as *Continental Illinois Nat. Bank & Trust Co. of Chicago* v. *Chicago, R. I. P. R. Co.*, 294 U. S. 648, *Commonwealth of Pennsylvania* v. *Williams*, 294 U. S. 176, 96 A. L. R. 1166, and *Craselli Chemical Co.* v. *Aetna Explosives Co.*, 2 Cir., 252 F. 456. But for my part these cases are authority for the S. E. C. here because its jurisdiction, given it by statute, is being exercised to the fullest extent that is *presently* appropriate. It has taken jurisdiction of the petitions and ordered a hearing with notice, just as it had committed itself to do on its original grant of exemption. And its jurisdiction, thus properly accepted, is now being flouted as drectly as was federal power in the cited cases, or in *S. E. C.* v. *U. S. Realty & Improvement Co., supra,* where, as we have seen, jurisdiction for the S. E. C. was much more difficult to discover, or in *In re Debs*, 158 U. S. 564, which was a still broader assertion of federal power and duty. [7] It seems to me that this case is an appropriate vehicle for vindication of an important

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[7] *Board of Railroad Commissioners of North Dakota* v. *Great Northern Ry. Co.*, 281 U. S. 412, so far as it goes is also a direct authority. There it was held that intrastate railroad rates established by a state commission would not be set aside because of the pendency of proceedings before the Interstate Commerce Commission *at the suit of the carriers.* The Court says significantly, 281 U. S. at page 430: "It is urged that the restraining power of the Court is needed to prevent irreparable injury. But, in this class of cases, the question whether there is injury, and what the measures shall be to prevent it, is committed for its solution preliminarily to the Interstate Commerce Commission."

federal right, brought in the proper federal court within the express language of general federal jurisdiction, 28 U. S. C. A. §41(1).[8]

But there seems to be a thought that the S. E. C. should first have taken some affirmative action which it could then ask the court to enforce under §18(f) of the Act. The reasons why the S. E. C. did not itself pass an order of injunction and then ask its enforecement are, as it states, that it wished to proceed with due circumspection and without prejudgment of the case. Further analysis, I believe, will show that it has done all it should properly have done at this stage of the proceedings. It could hardly issue anything like a permanent injunction without due notice and a hearing; this, or its full equivalent, it was proceeding to consider at the appropriate time, and it should be protected against the prejudice to its proper adjudication of the issues which is offered by the hasty action of the respondent in those proceedings before it. If, on the other hand, it should have issued some formal order of temporary restraint—without full hearing, for which time was lacking—mail service from Philadelphia is only overnight and such order can reach the District

[8] As the S. E. C. urges, it seems an overrefinement, suggesting an unnecessary limitation upon the general broad power of federal courts to protect federal jurisdiction as established by Congress, to place jurisdiction here entirely upon the terms of a single specific statutory enactment and thus circumscribe it by what is there expressed. It seems to me that the S. E. C. should be held entitled to sue here as an officer of the United States enforcing a public right under the laws of the United States. But if it is necessary to look to new grants of power, I suggest that §§18 (f) and 25 of the Act do chart the course, and that it is not sufficient to say that they apply only after definite orders of the S. E. C. and for violations thereof. As developed later in the text, it would seem that what the S. E. C. did amounted in substance to a determination that temporary restraint was in order. And rights and duties under the Act were, therefore, definitely threatened, so as to make these statutes applicable if a limited source of jurisdiction is considered thus requisite. Moreover, if there is doubt whether or not the necessary formalities have been completed by the S. E. C., the case should be held, as stated below, until we are sure they have been completed.

Court long before our mandate goes down. But in reality what will that add to the steps already taken by the Commission in first ordering a hearing and later in directing its General Solicitor to institute this action and press it for the safeguarding of the hearing as ordered? I assume we are not prepared to question the authorization of the Solicitor to act in the premises; if we are, the order of authorization will hardly be slow in arriving. All these seem to me only formalities, easily satisfied if not already completed, to justify the position of the S. E. C.; if it can come to the federal courts after a hearing on December 19 to protect its jurisdiction, it should be entitled to come to us before that date to protect a threat against the fairness of its hearing to determine the exercise of that jurisdiction, and the prejudice resulting from a coup d'etat by the corporation most involved.

Finally, if, notwithstanding these years of operation and the numerous court proceedings where it actually has been heard in protection of the public interest, the S. E. C. is found to have not only no duty, but no right, to act in the present situation, then it seems to me the preferred stockholders who are directly threatened with injury have a clear right to ask the court for relief. I should hold that they had such right under the implications of the Act itself, just as has been held with respect to other acts administered by the S. E. C., *Baird* v. *Franklin*, 2 Cir., 141 F. 2d 238, 244, 245, certiorari denied 65 S. Ct. 38; *Charles Hughes & Co.* v. *S. E. C.*, 2 Cir., 139 F. 2d 434, 437, 438, certiorari denied 64 S. Ct. 781; *Goldstein* v. *Groesbeck*, 2 Cir., 142 F. 2d 422, 427, certiorari denied *Groesbeck* v. *Goldstein*, 65 S. Ct. 36; but even if they must show diverse citizenship, as well as a federal right, there are undoubtedly persons who can fulfill all such requirements among the group appearing before us as *amicus curiae*. At least the case should be held below to give them the opportunity to appear as plaintiffs. *Cf. Hackner* v. *Guaranty Trust Co. of New York*, 2 Cir., 117 F. 2d 95, 98, certiorari denied 313 U. S. 559.

(Opinion of District Court.)

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF NEW YORK.

CIVIL ACTION, INDEX NO. 4606.

[SAME TITLE.]

Brooklyn, New York
December 21st, 1944

KENNEDY, *D. J.*

The plaintiff, Securities and Exchange Commission, applies for a temporary injunction restraining the defendant, its agents, servants and employees from "directly or indirectly consummating or carrying out, or taking any action or steps to consummate or carry out or effectuate" a certain plan of reorganization readjusting the rights of its preferred and common stockholders.

The prayer for relief plainly states that the temporary injunction sought here and the final injunction sought in the action are identical.

The plaintiff, which was created by Section 4 of the Securities and Exchange Act of 1934 (Act of June 6, 1934, c. 404, 48 Stat. 881, Title 15, U. S. C., Section 78, *et seq.*) is charged with the administration of the Public Utility Holding Company Act of 1935 (Act of August 26, 1935, c. 687, 49 Stat. 803, Title 15, U. S. C., Section 79 a, *et seq.*).

On November 7, 1935, the Long Island Lighting Company, the defendant here, applied to the plaintiff under Section 3 (a) (1) for exemption from the act. On March 27, 1936 the Commission granted such exemption, reserving, however, in its findings and opinion the right to

amend its order if it should find that the exemption is detrimental to the public interest because of the defendant's activity, or that of any subsidiary company, or because a burden was placed upon interstate commerce.

The motion is based upon the complaint, and the complaint alone, and although the defendant appeared by attorney, it submitted no papers in opposition.

However, extended argument was had, and counsel supplied me with a number of facts not in dispute which underlie the application.

The preferred stock of the company has never had voting rights. Arrears have been piling up on this preferred stock, and since March 27, 1936, the date when the defendant was exempted from the provisions of the Public Utility Holding Company Act these arrears aggregate more than ten million dollars (Complaint p. 4).

Evidently there has been desire on the part of everybody to make some adjustment in the corporate structure.

On February 29, 1944, the defendant submitted to the Public Service Commission of the State of New York a plan of readjustment, which, on April 25, 1944, its stockholders approved. This plan apparently was never acceptable to some of the preferred stockholders, who undoubtedly, in view of the increasing arrears, desired much greater control than the common stockholders were willing to give them. On July 27, 1944, the Public Service Commission of the State of New York acknowledged that it was helpless to compel the company to readjust its voting rights in accord with what could be considered "sound finance and equitable considerations" (Complaint p. 7).

Nevertheless the defendant continued its effort to secure approval of this plan from the Public Service Commission. Thereupon, and on November 4, 1944, a protective committee of preferred stockholders applied to the plaintiff. This committee asked that proceedings under Section 3 (a) of the Act be reopened, and on November

10, 1944, the Commission directed that a hearing be held to determine whether the exemption of the defendant was detrimental to the public interest and whether its order of March 27, 1936 should be revoked or amended (Complaint p. 4). Still later, and on November 21, 1944, the plaintiff on its own motion instituted a proceeding under Section 2 (a) (VII) (B) of the Act to determine whether certain persons and corporations exert a controlling influence on the policy of the defendant, and whether they should not be subject to the obligations of the statute. On November 22, 1944, the two proceedings then pending were consolidated and a hearing ordered on November 27, 1944. This hearing was adjourned (not on the application of the defendant) to December 19, 1944.

In the meantime, and on December 14, 1944, the Public Service Commission of the State of New York approved the plan of reorganization, and an order effectuating the plan was filed on December 16, 1944. It was conceded on the argument by the plaintiff's attorneys that on the date last mentioned the rights of the stockholders under the corporate structure theretofore existing came to an end under New York State law. The attorney for the New York Curb Exchange, appearing specially at the argument, stated to the court that trading in the old securities ceased on December 16, 1944 and transactions in the company's stock as modified by the reorganization commenced on December 18, 1944. In the early afternoon of December 19, 1944 there was submitted to me for signature an order to show cause containing an *ex parte* restraining clause as broad as the prayer for relief in the complaint itself. The motion was returnable on December 20, 1944. As will more fully appear later I had doubts about my power to grant even a temporary restraining order to the plaintiff. Nevertheless I did so.

From the argument of counsel for the plaintiff I conclude that specific jurisdiction to grant the injunction sought by the motion is not to be found in the act itself.

Certainly the defendant had violated no order, rule or regulation of the plaintiff; during all the times mentioned it was specifically exempt from the jurisdiction of the Commission. Defendant's proceedings in the Public Service Commission were taken openly, and apparently in full compliance with the law of the State of New York and of the administrative body to whose jurisdiction it was subject, namely the Public Service Commission. These proceedings, as indicated, stretched over the period between February 29, 1944 and terminated on December 16, 1944. Nor did the defendant, so far as either the complaint or the argument discloses, flout or ignore any order of the plaintiff with respect to the hearing ordered under Section 3 (a), or 2 (a) (VII) (B) of the act. No such claim was made. The plaintiff urges, however, that during the period between the final hearings in the Public Service Commission (September 27, 1944) and the final approval of the plan (December 14, 1944) the defendant was on notice that proceedings to revoke its exemption had been set in motion. Plaintiff says that these proceedings might result ultimately in bringing the defendant within the jurisdiction of the Commission, and that if this happened the Commission might not approve the reorganization plan. Meanwhile, says the plaintiff, security holders will proceed with exchanges under the reorganization plan "without disclosure of the fact that proceedings under the Act may require a radically different plan" (Complaint p. 13). This in turn may result in confusion to security holders as well as substantial difficulties to the Commission in the discharge of its duties.

The defendant, among other contentions, urges that to grant even a temporary restraining order here would be to subject the defendant to intolerable difficulty. It has sought and secured the approval of the necessary State authorities to the plan and has terminated the rights of the stockholders as they formerly existed. Nothing can

revive the old set of rights and liabilities; no one can substitute a new set. Meanwhile it will be impossible for the corporation, or anyone else, to determine how its stockholders shall vote.

If, as I have indicated, there is no specific statutory authority for the kind of order which the plaintiff seeks (and perhaps even if there were) it would be incumbent upon the plaintiff under general principles of equity to show that irreparable harm would result from the denial of the temporary injunction, and I use "would" in the sense that more than a bare possibility exists. I cannot say that such a showing has been made. Moreover the plaintiff, without specific statutory authority, is asking that on the bare complaint itself I should determine that it is entitled to all of the final relief which it seeks. Plaintiff's counsel admitted on the argument that in the case at bar there was no distinction between a temporary injunction and a permanent injunction, and I agree that this is so.

Leaving all other considerations out of the matter I doubt seriously that I have any such power as that which the plaintiff invokes.

I think plaintiff is really seeking a decision that the courts may, in aid of the statute (Act of August 26, 1935, c. 687, 49 Stat. 803, Title 15, U. S. C., Section 79 a, *et seq.*) restrain corporations not within plaintiff's jurisdiction against the commission of acts that plaintiff could deal with itself, were it later to acquire jurisdiction. Concededly this power has not been conferred upon the courts in terms by the Congress where it would most naturally be looked for, namely, in the statute itself. On the argument plaintiff's counsel seemed to urge that their cause was justiciable, and the relief sought should be granted under general principles of fair dealing—of equity. It is true that federal courts have general equity powers, but only when sitting in cases otherwise within their jurisdiction as defined by Congress (*Briggs* v.

United Shoe Machinery Co., 1915, 239 U. S. 48, 36 S. Ct. 6, 60 L. ed. 138). And so if plaintiff would set the court in motion on principles of equity it must first bring the cause within some of the familiar fields of jurisdiction granted to the courts by the Congress, such as diversity or the existence of a federal question.

I doubt that there could be any diversity here, and certainly it is not plainly set forth in the bill of complaint. Is there a federal question? If so it must lie in the suggestion that plaintiff, a federal agency, seeks to protect itself against acts which might hamper it in the execution of its duty to enforce the statute (Complaint p. 13). But I believe no federal question arises unless plaintiff's right of action may be said really and substantially to involve a controversy respecting the *validity* or *construction* of an act of Congress (*Shulthis* v. *McDougall*, 1912, 225 U. S. 561, 569; 32 S. Ct. 704, 706, 56 L. ed. 1205). The bill of complaint here does not disclose that any such controversy exists. Nor was it suggested in the argument that such a controversy exists, and that the granting or withholding of an injunction, either temporary or permanent, would really turn upon the construction or validity of the statute from which plaintiff derives its powers, or for that matter of any other federal enactment.

This reduces the issue to one that is comparatively narrow: under the guise of construing the statute to determine whether the power invoked by the plaintiff may be implied may I take jurisdiction, and then either exercise that power or not, depending upon which way the appeal to discretion lies? It seems to me that if I answer this question in the affirmative, and that if the courts under the guise of construing a statute can *give* themselves such sweeping power, then they and not Congress are defining jurisdiction. I cannot believe that this sort of "construction" (no matter how salutary the statute, or for that matter how great the specific benefit

achieved by a decision in favor of the existence of such power), can take the place of a real controversy over what Congress meant by the words it employed in the statute. This is more like deciding what Congress meant by silence. When appeal is made to general principles of fair dealing and of equity it is understandable that federal courts have at times been unwilling to renounce jurisdiction, and may have done so reluctantly; but as I understand the matter they must. And I do so, without touching questions like the wisdom or fairness of the plan of reorganization here assailed.

Nor do I consider the other questions that it would be necessary to decide in plaintiff's favor in order that the relief it asks might be granted. It was strongly urged that there is no clear showing of irreparable harm here if injunction be withheld; that the plan, having been consummated, cannot be undone, nor its execution halted without creating a chaotic condition in defendant's corporate structure; that the plan was *sub judice* in the administrative authority of the state for eight months before the preferred stockholders invoked plaintiff's protection, and almost four months after the Public Service Commission had in terms suggested this course to them (Complaint p. 7). Moreover it does not clearly appear whether these preferred stockholders have a remedy in the state courts to review the action of the Public Service Commission—a remedy that they failed to invoke. I acknowledge that this last consideration, the effect of failure to exhaust a possible remedy in tribunals of the state, is not to be charged to plaintiff. But the preferred stockholders appeared on this motion before me and were heard. It was they who set in motion at least a portion of the consolidated proceedings looking to the recapture of jurisdiction by the plaintiff. And were the merits before me I would think it proper to consider whether a temporary injunction here might do

violence not only to principles of equity, but to principles of comity also.

It is the power to speak on these matters that I renounce. One consideration remains. I intimated to counsel at the argument that I inclined to hold the views which I here express on the question of power. Indeed I adjourned the argument for several hours after indicating this, in the hope that counsels' research or mine would bring to light some controlling authority on the jurisdictional point. None was found. Counsel for plaintiff, in line with their duty, and no doubt appreciating that the want of a clear precedent injured their own cause, requested that I continue in force the broad *ex parte* restraining order, while review of any adverse ruling was secured. Since I have reached the conclusion that I am without power to grant the relief which plaintiff asks, and therefore should not have restrained defendant at all, I feel that this course would not be proper even though precedent seems to indicate that I might be justified in following it (*Merrimac River Savings Bank* v. *Clay Center*, 219 U. S. 527, 55 L. ed. 320; Moscowitz, *D. J.*, in *Matter of Realty Associates Securities Corporation, Debtor*, No. 45,024, E. D. N. Y., December 1, 1944). I suggested instead to counsel that the length and character of any temporary *ex parte* restraint could with greater propriety be determined by the reviewing Court.

Motion denied, temporary stay vacated, submit order.

HAROLD M. KENNEDY,
United States District Judge,
Eastern District of New York.

APPENDIX B.

(Affidavit in Opposition to Motion for Extension of Temporary Restraining Order.)

IN THE

SUPREME COURT OF THE UNITED STATES.

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

—against—

LONG ISLAND LIGHTING COMPANY,

Defendant.

State of New York,
County of New York—ss.:

HAROLD R. MEDINA, being duly sworn, deposes and says:

I am of counsel for Long Island Lighting Company in this proceeding.

The Company opposed plaintiff's application to continue the stay contained in the order to show cause by which these proceedings were commenced on December 19th, 1944 in the United States District Court; it opposed plaintiff's application to one of the judges of the Circuit Court of Appeals for the Second Circuit for a stay pending the determination of the appeal therein; it opposed plaintiff's application to said Circuit Court for a stay until final disposition of this case by this Court upon petition for writ of certiorari or until the determination of an application for a temporary injunction during the pendency of said writ of certiorari before this Court; it now opposes the present application to

continue the existing restraining order pending application to this Court for a writ of certiorari.

This is an action in which the sole relief sought by plaintiff is in substance the relief which plaintiff obtained in the beginning, still enjoys by virtue of the order of the Circuit Court, and will continue to profit by should the present application be granted. This granting from the beginning of this suit of the full relief prayed for by way of final judgment exists at the present time and will, if presently extended, continue to exist not only despite the most diligent and consistent protests by defendant that the United States District Court was wholly without jurisdiction to grant any relief, but despite the decision of the United States District Court and of the Circuit Court of Appeals that plaintiff was without power to seek, and the United States District Court without jurisdiction to grant, any part of the relief which plaintiff has thus, by the expedient of a succession of temporary restraing orders, obtained.

It is absolutely clear, as two courts have now found, that the Securities and Exchange Commission lacks the power to apply to the courts for the relief requested in this proceeding and that the courts are without jurisdiction to grant it. The power of the Commission to apply to the courts for relief with respect to its function under the Public Utility Holding Company Act, and the power of the courts to grant it relief, are fully and exhaustively set forth in that Act. The Commission finds no foundation for this suit in these plenary provisions. As Judge Hutcheson states in his opinion, "Indeed, the Commission in its brief disclaims them as the jurisdictional basis of the suit." As Judge Hutcheson concluded, and as defendant has contended throughout this proceeding, this disclaimer "settles the controversy against the commission". It takes no more than a reading of the jurisdictional provisions of the Act to determine that this suit is utterly without foundation.

The Commission, disclaiming the right to bring this suit under any authority to be found in the Public Utility Holding Company Act, relies upon the general equity powers of a Federal Court. The Circuit Court considered this contention at great length; it not only considered the cases cited by plaintiff in support of its position but also did its own independent research in an attempt to find precedent for the use of powers which the plaintiff claimed it had. It found no such precedent, stating, "No case has been cited to us, and none has been found, where a Federal Court has undertaken to protect by injunction a jurisdiction not presently existing, merely because upon speculative and problematical circumstances, such jurisdiction may at some uncertain time in the future, arise."

After plaintiff's contentions have thus been so thoroughly considered and found wanting in merit it would be a grievous injustice to the defendant to continue the restraining order which every court that has considered the matter has concluded it was without jurisdiction to grant.

The restraining order has been extremely prejudicial to Long Island in the conduct of its business and if continued may well prove disastrous to it.

Long Island is a gas and electric company incorporated under the *Transportation Corporations Law* of the State of New York. It has at all times been subject to the jurisdiction of the Public Service Commission of the State of New York. It has never been subject to the jurisdiction of the Securities and Exchange Commission and was expressly exempted from the provisions of the Public Utility Holding Company Act by order of that Commission dated March 27, 1936.

All that Long Island has done with respect to its plan of recapitalization has been done in accordance with the orders of the Public Service Commission and the laws of the State of New York. Proceedings before the Public

Service Commission on the plan of recapitalization were instituted long before Long Island had any notice that the Securities and Exchange Commission was interested in reconsidering its order exempting Long Island from the provisions of the Act.

In the ordinary course of its procedure, and after extensive public hearings held during the months of March through September, 1944, the Public Service Commission on December 14, 1944 issued an order approving the plan. On December 16, 1944, Long Island, in accordance with Section 36 of the New York *Stock Corporation Law*, filed the certificate of recapitalization, together with the order of the Public Service Commission approving the same, in the office of the Secretary of the State of New York.

According to the law of New York, the plan became effective on such filing (*General Corporation Law*, §8), and it is conceded that the rights of stockholders under the corporate structure theretofore existing came to an end.

Long Island's plan of recapitalization is presently in effect; the old securities and all rights thereunder are gone. Thus the only effect of the restraining order, expressly enjoining Long Island from making any request for the surrender of certificates representing outstanding shares of capital stock, the overprinting of any legend on such certificates, or the issue or delivery of any certificates in exchange, is to create untold confusion and uncertainty in Long Island's affairs.

I need not dwell on the dire consequences to Long Island flowing from the fact that it has, by virtue of the restraining order, no stockholders with whom it can safely treat. It can, therefore, do none of the things which by the law of New York require the consent of stockholders.

According to its by-laws, Long Island, after previous notice, must hold its annual stockholders meeting on April 17, 1945, at which stockholders of record on April 7, 1945

are entitled to vote. Long Island, because of the restraining order, has no such stockholders.

A further difficulty, of a most serious character, is that a continuance of this stay will result in a default under the trust indentures securing Long Island's bonded indebtedness.

By Section 3.15 (c) of the trust indenture securing its $10,000,000 3¾% Sinking Fund Debentures, Long Island covenants as follows:

> "(c) Not later than 90 days after the expiration of each fiscal year (which, until the Company shall otherwise notify the Trustee, shall be deemed to be the calendar year), the Company will deliver to the Trustee a statement of income, profit and loss and surplus accounts of the Company for such fiscal year and a balance sheet of the Company as of the last day of such fiscal year. Such statements and balance sheets shall set forth in reasonable detail the results of operations and the financial condition of the Company and shall be certified by an independent firm of certified public accountants satisfactory to the Trustee; the certificate of such certified public accountants to state that in making the audit necessary to such certification they have obtained no knowledge of any default by the Company in any of the terms, provisions or conditions of *Sections 3.07 to 3.14*, both inclusive, of this *Article Third* or, if they shall have obtained knowledge of any such default, they shall disclose in their certificate the default and the nature thereof."

December 31, 1944, was the end of Long Island's fiscal year, so that the time within which to meet the conditions of the trust indenture above quoted will expire on March 31, 1945. After March 31, 1945, should this re-

straining order be continued, Long Island will be in default under its trust indenture and the publicity attendant upon such an event cannot fail to have a gravely prejudicial effect upon the company. It is obvious that Long Island cannot, because of the restraining order, comply with its covenant. Because the restraining order enjoins Long Island from taking any steps directly or indirectly to consummate or carry out its plan of reorganization, Long Island has been unable to change its books and accounts to show the new capitalization. But the new capitalization is the only capitalization, and no firm of certified public accountants, with knowledge of Long Island's capitalization as it appears in the office of the Secretary of State for the State of New York, would certify a balance sheet showing the old capitalization.

Practically an identical problem is presented as concerns Long Island's First Mortgage Bonds under Article III, Section 18, of the trust indenture securing these bonds.

Whereas the temporary restraining order, outstanding though there has been declared no jurisdiction to issue it, is creating havoc with Long Island's affairs, the Securities and Exchange Commission will be in no wise injured with respect to its functions under the Public Utility Holding Company Act if this Court denies the present application to extend the restraining order. The Commission has no jurisdiction over Long Island and may well never have such jurisdiction. It will have jurisdiction only if all the following occur: (1) The Commission, finding that the circumstances which gave rise to the order of exemption no longer exist, decides to revoke Long Island's exemption from the Act; and (2) it is held that Long Island is engaged in interstate commerce or in activities which directly affect or burden interstate commerce; and (3) that Long Island is required, because of Section 4 of the Act, to register under Section 5 of the Act. It is Long Island's position that none of these events can occur and that it

will never be subject to the provisions of the Public Utility Holding Company Act. Of course the Commission does not claim that it has or will ever have jurisdiction over Long Island. Its only claim is that of mere possibility.

Passing the question of jurisdiction, the Commission does not claim that, having jurisdiction, it would disapprove of Long Island's capital structure. This is a matter which it could decide only after full hearing, and the question is one upon which it is in no position to comment, it not having done any of the things which the Act requires it to do before formulating an opinion.

Thus, whether the Commission will ever concern itself with Long Island's capital structure, and whether if it did so it would disapprove the present capitalization, are entirely matters of conjecture.

In all of its applications for restraining orders in this proceeding, the Commission has made the contention that but for a restraining order, its possible duties under Section 11 of the Act will be embarrassed if not frustrated. This claim is patently groundless. If and when the Commission revokes Long Island's exemption, the corporate structure which it can examine in a Section 11 proceeding can only be the corporate structure existing at that time. Long Island's old capital structure, the one it had before December 16, 1944, will then be of no more interest to the Commission than the history of any other corporate structure subject to a Section 11 proceeding. The present restraining order does not and cannot have the effect of keeping the old capital structure alive; that was obliterated when Long Island filed its certificate, and the order of the Public Service Commission approving the same, with the Secretary of State for the State of New York at a time when Long Island was subject only to state authority.

If the Securities and Exchange Commission shall, in the future, have jurisdiction to examine Long Island's

corporate structure in a Section 11 proceeding its jurisdiction with respect to that structure will be as complete as the statute provides. It will in nowise be affected by a failure to extend the existing restraining order.

The Commission has also suggested that but for a continuance of the restraining order there may be persons who will deal in the new securities innocently and without actual knowledge of the issues in the present proceedings before the Commission and such new issues as might be the subject of consideration by the Commission under the Public Utility Holding Company Act, in the event of the effective revocation of the order of exemption. This is only to say that any investor who purchases public utility securities takes the risk of subsequent action by the Commission. Certainly the risk is greatest to the innocent investor who purchases securities of public utility companies whose capital structures are already being examined by the Commission. Standard Gas & Electric Company, United Corporation, Electric Bond & Share, Engineers Public Service, are companies whose capital structures are presently being examined in a Section 11 proceeding. Yet securities of these companies are being freely traded on a national securities exchange. Certainly it is not Long Island's purpose to conceal the administrative proceeding being held by the Commission to determine whether Long Island's exemption should be revoked, and the Company has taken every occasion to inform those interested concerning the fact of the proceeding. It will continue to do so. Furthermore, I have noticed that the New York City newspapers, at least, have given substantial publicity to the court proceedings in this matter.

In connection with the claim of the Commission that purchases by investors may complicate the task of the Commission in the event that it should ultimately obtain jurisdiction to inquire into Long Island's capital structure, the Court will also bear in mind that the Commission

itself has admitted that such transactions have already been had in the "over the counter" market. Furthermore, it is obvious that the holders of the old certificates have the undoubted power to assign and transfer their existing interests or any part thereof by common law assignment, and I am informed that such transfers in large amounts have already been made.

The Commission's right to the relief here sought has been thoroughly considered by the District and Circuit Courts and denied without reservation. The decisions of these Courts are sound beyond any possible doubt. To continue in effect the very order which these Courts thus found they had no jurisdiction to grant would be a denial of justice to the defendant, particularly as a continuance of the restraining order will work great hardship on defendant while affording absolutely no advantage of substance to plaintiff.

I respectfully submit that the relief herein prayed for by plaintiff be in all respects denied.

HAROLD R. MEDINA.

Sworn to before me this
17th day of March, 1945.

EUGENIE WHITNEY,
Notary Public.
Kings Co. Clk. No. 243, Reg. No. 337W6.
Certificate filed in
N. Y. Co. Clk. No. 904, Reg. No. 529W6.
Bronx Co. Clk. No. 51, Reg. No. 171W6.
Queens Co. Clk. No. 1098, Reg. No. 236W6.
Commission expires March 30, 1946.